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No. 73-759

In the Supreme Court of the United States

OCTOBER TERM, 1973

HON. EDWIN EDWARDS, GOVERNOR OF LOUISIANA, ET AL.,

Appellants,

v.

MARSHA B. HEALY, ET AL.,

Appellees.

On Appeal From the United States District Court For the Eastern District of Louisiana

Brief for Appellants

WILLIAM J. GUSTE, JR.,
Attorney General of Louisiana.

WARREN E. MOULEDOUX,
First Assistant Attorney General of Louisiana.

ROBERT L. DANNER, JR.,
Special Counsel.

Attorneys for Appellants
P.O. Box 44005
Baton Rouge, Louisiana 70804

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Brief for Appellants

Opinion Below

The opinion of the three-judge United States District Court for the Eastern District of Louisiana is reported at 363 F. Supp. 1110.

Jurisdiction

Appellants filed a notice of appeal to this Court in the District Court on September 18, 1973. The Jurisdictional Statement was filed on November 12, 1973, and probable jurisdiction was noted on February 19, 1974. Jurisdiction on appeal is conferred by 28 U.S.C.A. § 1253.

Constitutional and Statutorial Provisions Involved

The three-judge court in the United States District Court, Eastern District of Louisiana, declared unconstitutional and enjoined the enforcement of Article 7, Section 41 of the Constitution of Louisiana, LSA-R.S. 13:3055, and Article 402 of the Louisiana Code of Criminal Procedure, which are as follows:

(a) Article 7, Section 41 of the Constitution of Louisiana:

> The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

(b) LSA-R.S. 13:3055:

> A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

(c) Article 402 of the Louisiana Code of Criminal Procedure:

> A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

Questions Presented

1. Did the three-judge court abuse its discretion by overruling *Hoyt v. Florida*, 368 U.S. 57 (1961)?

2. Do the Louisiana constitutional and statutorial provisions that exempt women from service on juries unless they file a written declaration of their desire to serve deny all of the male and female citizens of Louisiana due process and equal protection as sanctioned by the 14th Amendment of the United States Constitution?

Statement of the Case

This action was commenced in the United States District Court for the Eastern District of Louisiana. Appellees claimed to be litigating on their own behalf and on behalf of others similarly situated. Named as defendants were all of the appellants.

The complaint sought declaratory and injunctive relief before a three-judge court.

The three-judge court rendered its opinion on August 31, 1973, declaring Article 7, Section 41 of

the Constitution of Louisiana, LSA-R.S. 13:3055, and Article 402 of the Louisiana Code of Criminal Procedure, which provide an exemption of women from jury service, to be unconstitutional and enjoined appellants from enforcing these constitutional and statutorial provisions. Simultaneously the three-judge court overruled *Hoyt v. Florida*, 368 U.S. 57 (1961).

Following the opinion and order of the court below, appellants filed a motion to stay execution. The stay was granted by order of the court dated September 10, 1973. Thereafter, appellants filed their notice of appeal.

Appellants consist of the original defendants. Appellees consist of all those originally designated as parties plaintiffs and intervenors.

Argument

1. The Louisiana constitutional and statutorial provisions that exempt women from service on juries unless they file a written declaration of their desire to serve does not deny all of the male and female citizens of Louisiana due process and equal protection as sanctioned in the 14th Amendment of the United States Constitution.

One of the basic principles of constitutional law with regard to class legislation is that classifications and restrictions which serve to penalize or restrict the exercise of a constitutionally protected right are to be scrutinized closely and must be shown to promote a "compelling governmental interest" in order to withstand attack under the 14th Amendment. *See Shapiro*

v. Thompson, 394 U.S. 618 (1968); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

Therefore, discrimination by sex is not patently unlawful or unconstitutional. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (Statute providing minimum wage for women but not men); *Rodice v. New York*, 264 U.S. 292 (1924) (special statute limiting hours of night work of women in cities with a particular population); *Goesaert v. Cleony*, 335 U.S. 454 (1948) (proscribing use of women as licensed bartenders); *Hoyt v. Florida*, 368 U.S. 57 (1961) (jury duty voluntary for women but compulsory for men); *Miskunas v. Union Carbide Corp.*, (7th Cir. 1968) 399 F.2d 847, *cert. denied*, 393 U.S. 1066 (1969) (denial to wife, but not husband, of right to recover for loss of consortium); *Gruenwald v. Gardner*, (2nd Cir. 1968) 390 F.2d 591, *cert. denied*, 393 U.S. 982 (1968) (women given more favorable treatment than men in Social Security benefits); *United States v. St. Clair*, (D.C. N.Y. 1968) 291 F. Supp. 122 (men subject, women not, under Selective Service Act); *Clarke v. Redker*, (D.C. Iowa 1966) 259 F. Supp. 117, (fixing wife's residence by husband's but not the reverse); *Heaton v. Bristol*, (Tex. Cir. 1958) 317 S.W.2d 86, *cert. denied*, 359 U.S. 230 (1959) and *Allred v. Heaton*, (Tex. Cir. 1960), 336 S.W.2d 251, *cert. denied*, 364 U.S. 517 (1960) (both involving denial of right of women to attend all-male state-supported college).

The rational basis and compelling state interest for exempting women from jury duty was passed on and upheld by this Court in *Hoyt v. Florida*, 368 U.S. 57 (1961). In that case the constitutionality of a Florida statute almost identical to the provisions of Louisiana Code of Criminal Procedure, Article 402 and Article 7, Section 41 of the Louisiana Constitution of 1921 was at issue. The Court upheld the constitutionality of the Florida statute stating:

> We cannot say that it is constitutionally impermissible for a state, acting in pursuit of the general welfare to conclude that a woman should be relieved from the civil duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. [*Hoyt, supra*, at 368 U.S. 62, 82 S. Ct. 162-163.]

And at page 61:

> In the selection of jurors Florida has differentiated between men and women in two respects. It has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men. And it has provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men: women are not to be put on the jury list unless they have voluntarily registered for service: men, on the other hand, even if entitled to an exemption, are to be included on the list unless they have filed a written claim of exemption as provided by law. Fla. Stat., 1959, § 40. 10, F.S.A.
>
> In neither respect can we conclude that Florida's statute is not "based on some reasonable classification," and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.

This rationale is the rule and not the exception in Louisiana. In 1970 out of a total of 1,340,336 women in Louisiana, 67.2% or 901,134 were not in the labor force. II *Women Workers in Louisiana, 1970*, by Susan Holton, Administrator, Commission on the Status of Women, State Department of Labor of Louisiana. Of those women without young children in 1965 and with pre-school age children in 1970, 62.3 percent of the 33.8 percent who were workers in 1965 were non-workers in 1970. II *Women Workers in Louisiana, 1970*, at page 9. Further, 57% of the women working, 32.8% of total women population, had either no children or no children under 18 years. II *Women Workers in Louisiana, 1970*, at page 12.

There has been no contrary jurisprudence from this Court since the *Hoyt* decision, although this Court has had the opportunity to overrule the case at least once. In *Alexander v. Louisiana*, 405 U.S. 625 (1972), the question of the constitutionality of Louisiana Code of Criminal Procedure, Article 402 was not decided, the majority preferring to base the decision (reversing a conviction) on other grounds. To the contrary, in *Leighton v. Goodman*, 311 F. Supp. 1181 (1970) and *United States v. Coci*, 401 F.2d 664, 671 (2nd Cir. 1968), *cert. denied*, 394 U.S. 917 (1969), the con-

stitutionality of the New York statute permitting women to claim exemption has been sustained, both courts citing *Hoyt v. Florida, supra.*

The Louisiana Supreme Court has followed the decision in *Hoyt, supra,* in numerous cases. See *State v. Enloe,* 276 So.2d 283 (1973); *State v. Curry,* 263 So.2d 36 (1972); *State v. Daniels,* 263 So.2d 859 (1972); *State v. Reese,* 194 So.2d 279, *cert. denied,* 389 U.S. 996 (1967); *State v. Comeaux,* 211 So.2d 820 (1968); *State v. Pratt,* 233 So.2d 891 (1970); *State v. Alexander,* 233 So.2d 891 (1970); *State v. Sinclair,* 245 So.2d 365 (1971); *State v. Millsap,* 248 So.2d 324 (1971), and *State v. Amphy,* 249 So.2d 560 (1971).

We recognize that during the past century women's rights have steadily increased to a point where, in most respects, they enjoy the same legal status as male members of our essentially industrial society. Much of this drive towards women's emancipation has resulted from feminists' organized efforts. The time may very well be ripe for amendment of Louisiana Code of Criminal Procedure, Article 402, R.S. 13:3055 and Section 41 of Article 7 of the Louisiana Constitution of 1921 to remove this exemption. But the constitutionality of that statute does not turn on whether the state legislature would be well advised to amend it, or even upon the existence of some discrimination. It turns upon whether the classification based upon sex constitutes such an individous discrimination that it is patently arbitrary and utterly lacking in any ra-

tional justification. If any reasonable basis exists for the alleged statutory discrimination, it must be upheld. *See McGowan v. Maryland,* 366 U.S. 420, 426, (1960); *Flemming v. Nestor,* 363 U.S. 603,611 (1955). The Court does not "sit as a superlegislature . . . ," *Salsburg v. Maryland,* 364 U.S. 545, 281 (1953).

In *Leighton v. Goodman,* 311 F. Supp. 1181 (1970), suit was brought by a prospective male juror to declare unconstitutional a New York statute which grants exemption from jury duty to women. In dismissing the suit on defendant's motion pursuant to Rule 12 (b) (1) and (6), the Court addressed itself to the issue of plaintiff's "standing" and stated:

> At the outset we have serious question as to whether plaintiff's action reveals sufficient danger of injury or harm to him to give him standing to attack the constitutionality of § 599 (7). See Gruenwald v. Gardner, 390 F. 2d 591 (2nd Cir) cert. denied, 393 U.S. 982, 89 S. Ct. 456, 21 L. Ed. 2d 445 (1968). There is no indication that even if women were not entitled to statutory exemption plaintiff would not be required to serve. The most that can be said (although it is not asserted by plaintiff) is that if women were obligated to serve without exemption, fewer male jurors might be needed and plaintiff might then be among those not called, which at best presents an extremely thin basis for giving him the right to attack § 599 (7).

Further, in *Alexander v. Louisiana,* 405 U.S. 625 (1972), this Court specifically addressed itself to the equal protection argument brought by a male chal-

lenging Article 402 of the Louisiana Code of Criminal Procedure and held accordingly:

> Petitioner also challenges the Louisiana statutory exemption of women who do not volunteer for grand jury service. Article 402, La. Code Crim. Proc. This claim is novel in this court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. Carter v. Jury Commission of Green County, *supra. But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service.* (Emphasis ours.)

As noted by Judge Dawkins in *United States ex rel Doris v. Henderson*, 330 F. Supp. 797 (W.D. of La. 1971):

> The intentional exclusion by a State of qualified persons from a grand or petit jury because of race or national origin has been held to be violative of equal protection of the law. Patton v. Mississippi, 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76 (1947); Hernandez v. Texas, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954). *The Supreme Court has not applied the equal protection clause to prohibit exclusion or inclusion on a jury for any reason other than race or national origin.* See Brown v. Allen, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953);

> Fay v. New York, 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947); Hoyt v. Florida, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961). It is well settled that the Constitution does not require proportional representation. Fay v. New York, supra; Hoyt v. Florida, supra; Akins v. Texas, 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945). (Emphasis ours.)

This Court in *Reed v. Reed*, 404 U.S. 71 (1971) recognized that dissimilar treatment of different classes of persons is not unconstitutional if the "classification is reasonable, not arbitrary, and rests on some ground of difference having a fair and substantial relation to the object of the legislation." This Court also in *Frontiniero v. Richardson*, 411 U.S. 677 (1973), recognized that dissimilar treatment for men and women could be constitutional even applying "strict judicial scrutiny."

2. The three-judge court abused its discretion by overruling *Hoyt v. Florida*, 368 U.S. 57 (1961).

The lower court in its opinion at page 23 of the Jurisdictional Statement held:

> When today's vibrant principle is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that Hoyt is no longer binding.

With this language that court overruled *Hoyt*. A district court even when sitting as a three-judge court cannot reverse the Supreme Court of the United States. *Ward v. Luttrell*, 292 F. Supp. 162 (D.C. La. 1968). Three-judge district court was bound by Supreme

Court of the United States decisions upholding constitutionality of state laws prescribing maximum working hours for women. *Ward, supra.*

Inferior court could not overrule a decision of the Supreme Court of the United States. *Bush v. Orleans Parish School Board*, 188 F. Supp. 916, *aff'd*, 365 U.S. 569.

Conclusion

For the reasons stated above, the judgment of the three-judge court in the United States District Court for the Eastern District of Louisiana should be reversed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
Attorney General of Louisiana.

WARREN E. MOULEDOUX,
First Assistant Attorney General.

Attorneys for Appellants
P.O. Box 44005
Baton Rouge, Louisiana 70804.

Certificate

I HEREBY CERTIFY that copies of the foregoing Brief for Appellants have been served upon all counsel by depositing same in the United States mail, postage prepaid, this _____ day of April 1974.

WARREN E. MOULEDOUX

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